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No. 82-1148

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. QUEEN, ET AL., PETITIONERS
v.
TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

ROBERT C. GLINSKI
Attorney

Tennessee Valley Authority
Knoxville, Tennessee 37902

QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioners' common law tort claims were barred by absolute immunity under *Barr* v. *Matteo*, 360 U.S. 564 (1959).

2. Whether the court of appeals correctly held that the district court acted within its discretion in refusing to enjoin respondents from answering inquiries about petitioners' product.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-13 to A-26) is reported at 689 F.2d 80. The opinion of the district court (Pet. App. A-1 to A-11) is reported at 508 F. Supp. 532.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1982. The petition for a writ of certiorari was filed on December 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners manufacture and market a device called the "Phase-Liner" through a system of distributors and dealers (Pet. App. A-14 to A-15). They claim that the Phase-Liner can substantially reduce the electric bills of residential and small commercial consumers of electricity supplied by the

Tennessee Valley Authority ("TVA") and have promoted the device by television and newspaper in the area where TVA power is sold (*ibid.*).[1]

Representatives of TVA have responded to inquiries from the public and the press about the Phase-Liner and have communicated the opinion of TVA engineers that the device will not reduce the electric bills of residential and small commercial consumers of TVA power (Pet. App. A-14 to A-15, A-16).[2] Differences of opinion between the parties became the subject of press releases, newspaper articles, and publicly staged experiments (*id.* at A-15). In 1979 a local distributor of the device filed a libel suit against TVA; that case was dismissed with prejudice as to the claim for monetary damages and without prejudice as to the claim for injunctive relief (*ibid.*). Petitioner John Queen was not a party to that action but appeared during the discovery proceedings as a deponent, as an expert witness, and as the manufacturer of the Phase-Liner (*ibid.*).

2. This suit was filed in the United States District Court for the Eastern District of Tennessee seeking damages, a declaratory judgment, and an injunction. Petitioners alleged that statements made by TVA employees about the Phase-Liner and about the prior lawsuit were defamatory (Pet. App. A-17). The district court held that petitioners' claim for damages was precluded by this Court's decision in *Barr*

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[1]TVA is a wholly owned government corporation, created by the Tennessee Valley Authority Act of 1933 ("TVA Act"), 16 U.S.C. (& Supp. V) 831-831dd, and declared by this Court to be "an instrumentality of the United States" (*Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 134 (1939)). Pursuant to the TVA Act, TVA supplies electricity in major parts of Tennessee and adjoining states. See *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 4 (1968).

[2]One of the documents that petitioners are seeking to enjoin from distribution is a report by a TVA engineer based upon his examination and testing of the device (C.A. App. 93).

v. *Matteo*, 360 U.S. 564 (1959), since the statements made by TVA's employees were privileged and TVA could not be held vicariously liable (Pet. App. A-4 to A-7). With respect to petitioners' request for a declaratory judgment and permanent injunction, the court held that the merits of this alleged energy conservation device were a matter of public interest and that it would not enjoin debate on such a matter (*id.* at A-7 to A-10).

The court of appeals affirmed, applying *Barr* v. *Matteo* to the damages claims against the TVA employees (Pet. App. A-17 to A-21) and holding that TVA could not be liable in damages for carrying out its statutory mandate (16 U.S.C. 831i) "to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries" (Pet. App. A-25). The court of appeals also held that the district court "did not abuse its discretion in declining to issue an injunction in a dispute that is best resolved by the expression, and not the suppression of information and ideas" (*id.* at A-26).[3]

Judge Merritt dissented. In his view, the doctrine of absolute immunity "should be declared dead except in the case of a few officials for whom there are impelling constitutional or policy reasons for such an immunity — members of Congress, judges and prosecutors and the President." Pet. App. A-27. With respect to TVA itself, Judge Merritt would likewise reject absolute immunity in favor of a federal common law of liability drawing on an analogy to the Federal Tort Claims Act; he acknowledged, however, that

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[3]The court of appeals also noted that in his deposition petitioner Queen appeared not to disagree with TVA's assessment of the Phase-Liner (Pet. App. A-25 to A-26). "[Petitioners] appear to object more to the dissemination rather than the content of the statements made by TVA about their product" (*id.* at A-26).

the FTCA expressly excludes TVA and that, even under that statute, the present case would be barred (*id.* at A-28 & n.1). Accordingly, Judge Merritt would have remanded the case although "[petitioners] would probably lose on the merits" (*id.* at A-28).

ARGUMENT

The court of appeals fully considered and correctly decided the issues before it. The court's decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, the case does not warrant further review.

1. Petitioners' common law damages claims, based upon alleged defamatory statements made by federal officials acting within their lines of duty, are precluded by this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Howard* v. *Lyons*, 360 U.S. 593 (1959). Where, as here, federal officials perform their professional responsibilities within the outer perimeter of their authority, they are immune from liability for damages based upon common law torts.[4]

TVA is authorized to generate and sell electric power as part of its regional resource development responsibilities. See, *e.g.*, 16 U.S.C. 831n-4(h). As an adjunct thereto, TVA has been granted broad powers to study and disseminate information about the proper use of electricity. As the court of appeals noted (Pet. App. A-25), the TVA Act, 16 U.S.C. 831i, "direct[s] the TVA 'to make studies, experiments and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for

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[4]This doctrine is applicable to TVA employees. *Walters* v. *TVA*, 503 F. Supp. 111 (E.D. Tenn. 1980), aff'd, 698 F.2d 1225 (6th Cir. 1982), cert. denied, No. 81-1976 (Oct. 4, 1982); *Barnes* v. *Oody*, 514 F. Supp. 23 (E.D. Tenn. 1981).

small or local industries,' " looking towards "the fuller and better balanced development of the resources of the region." The TVA Act also authorizes TVA to study and publicize "the practices, methods, facilities, equipment, [and] appliances" that are "best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy (16 U.S.C. 831m).[5]

In fulfilling its responsibility "to assure an ample supply of electric power" at "rates as low as are feasible" (16 U.S.C. (& Supp. V) 831n-4), TVA encourages conservation measures. Such measures reduce TVA's capital expenditures and thus benefit all the region's consumers. However, if residential and small commercial consumers expend funds on ineffective devices, fewer funds will be available for the purchase of proven and effective devices, such as electric heat pumps and insulation (Pet. App. A-16).

In light of these well-defined statutory responsibilities, there is no dispute that the TVA employees were acting within their statutorily prescribed duties.[6] Indeed, in their brief in the court of appeals (at 15), petitioners conceded that "[t]here has never been an issue raised in these proceedings on whether or not the employees of TVA were acting

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[5]In addition to these specified powers, the TVA Act grants TVA "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred" (16 U.S.C. 831c(g)). Petitioners' narrow reading of the Act is contrary to the command of 16 U.S.C. 831dd that the Act be "liberally construed." Cf. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 552-554 (1946).

[6]Copies of the official job descriptions setting forth the duties of respondents Crowell and Butler and the other TVA employees who allegedly made defamatory statements were submitted to the district court (Pet. App. A-5 to A-7, A-19 to A-20; see C.A. App. 264-269, 289-292, 307-308, 312-313, 330-332). At the time of the events at issue, Crowell was TVA's Director of Information and Butler was TVA's Manager of Media Relations (Pet. App. A-5).

within the scope of their duties." Thus, this case fits squarely within the scope of immunity conferred in *Barr* v. *Matteo, supra,* 360 U.S. at 575:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable.

Moreover, as the court of appeals held (Pet. App. A-21):

> The policies which favor the *Barr* rule are most appropriate in defamation actions of this type, where the [respondents] have a statutory directive to speak out on a matter of public concern, and where the [petitioners] * * * seek to enjoin or impose liability on them for their good faith evaluation and criticism of their product.[7]

Petitioners nevertheless suggest that TVA employees' statements about electrical devices are a "proprietary" rather than a "governmental" function (Pet. 8-9). The court of appeals noted, however, that the conduct in question here was "the exercise of certain wholly governmental functions" and was "expressly directed and authorized by a valid constitutional Act of Congress" (Pet. App. A-25). Such action is plainly governmental. See, *e.g., Federal Land Bank* v. *Board of County Comm'rs,* 368 U.S. 146, 150-151 (1961); *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102 (1941); *Pittman* v. *Home Owners' Loan Corp.,* 308 U.S. 21, 32 (1939).[8]

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[7] *Barr* itself, of course, was a defamation action. The Court has recently reaffirmed that federal officials have "absolute immunity from suits at common law" (*Harlow* v. *Fitzgerald,* No. 80-945 (June 24, 1982), slip op. 7). See also *Butz* v. *Economou,* 438 U.S. 478, 488-489 (1978).

[8] Because TVA's employees are immune from suit, the claim that TVA is vicariously liable for their acts must also fall. See *Walters* v. *TVA,*

2. Contrary to petitioners' assertions (Pet. 6-8), the "sue-and-be sued" clause of the TVA Act, 16 U.S.C. 831c(b), does not affect or generate substantive liability. It merely removes the procedural bar to suit against a government instrumentality. The legislative history of the provision indicates its procedural nature ("so that all persons who had a cause of action against the corporation might have their day in court") (H.R. Rep. No. 130, 73d Cong., 1st Sess. 16 (1933)), and this principle has been followed consistently by the courts. See, *e.g.*, *Atchley* v. *TVA*, 69 F. Supp. 952 (N.D. Ala. 1947); *Grant* v. *TVA*, 49 F. Supp. 564, 565 (E.D. Tenn. 1942). In *Atchley*, the court held (69 F. Supp. at 954):

> A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist. *Lynn* v. *United States*, 5 Cir., 1940, 110 F.2d 586; cf. *Posey* v. *Tennessee Valley Authority*, 5 Cir., 1937, 93 F.2d 726.

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supra; Stewart v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761, 763 (1961). A common law claim for vicarious liability is governed by state law. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963); *Jackson* v. *TVA*, 413 F.Supp. 1050, 1055 (M.D. Tenn. 1976), aff'd, 595 F.2d 1120 (6th Cir. 1979). And in *Stewart* v. *Craig*, *supra*, the Tennessee Supreme Court held that vicarious liability of the principal is barred when the agent is not subject to liability.

In any event, as the court of appeals held (Pet. App. A-25), TVA is not subject to suit for an exercise of wholly governmental functions.

Since the TVA would not otherwise be liable to petitioners, their reference to the "sue-and-be-sued" clause adds nothing to their argument.[9]

3. The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for an injunction and a declaratory judgment. Finding a "public interest in energy conservation and energy saving devices" (Pet. App. A-9), the district court held (*id.* at A-8):

> The free discussion of matters of public interest is not properly enjoined. *Robinson v. American Broadcasting Cos.*, 441 F.2d 1396 (6th Cir. 1971); *American Broadcasting Cos. v. Smith Cabinet Mfg. Co.*, 160 Ind. App. 367, 312 N.E.2d 85 (1974); *Krebiozen Research Foundation v. Beacon Press, Inc.*, 344 Mass. 86, 134 N.E.2d 1 (1956).

The cases cited by the district court,[10] and numerous other cases, hold that the efficacy and quality of goods and

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[9]Petitioners are incorrect in asserting (Pet. 6) that TVA and its employees "enjoy a more favored position than the federal government itself because of the liability imposed on the federal government through the Federal Tort Claims Act." It is true that claims against the United States arising from TVA's activities are exempted from that Act (28 U.S.C. 2680(*l*)); but it is likewise the case that all claims against the United States based on libel and slander, such as petitioners allege here, are also exempted from that Act (28 U.S.C. 2680(h)). Thus, the bar to petitioners' claim does not turn on any purportedly "favored" position of TVA.

We also note that petitioners have claimed punitive damages (Pet. 2). Such a remedy does not lie against TVA (*e.g.*, *Painter* v. *TVA*, 476 F.2d 943 (5th Cir. 1973); *Grant* v. *TVA*, 44 F. Supp. 589 (E.D. Tenn. 1941)), and that portion of the complaint is subject to dismissal on this ground as well.

[10]The district court also noted this Court's statement in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), that " 'energy conservation * * * is an imperative national goal' " (Pet. App. A-7 to A-8).

services sold to the public are matters of public interest. See *National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374 (S.D. N.Y. 1980); *Lewis* v. *Reader's Digest Ass'n*, 366 F. Supp. 154, 156 (D. Mont. 1973); *Hoxsey Cancer Clinic* v. *Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957); *Steaks Unlimited, Inc.* v. *Deaner*, 468 F. Supp. 779 (W.D. Pa. 1979), aff'd, 623 F.2d 264 (3d Cir. 1980); *Trails West, Inc.* v. *Wolff*, 298 N.E.2d 52 (N.Y. 1973). Comments about petitioners' alleged energy saving device clearly fall within the ambit of these cases. Accordingly, petitioners' claims for equitable relief were properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

ROBERT C. GLINSKI
Attorney
Tennessee Valley Authority

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